

# AG Succession

## Succession Planning in Agriculture

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### ***Adult Interdependent Partners and Farm Estate Planning***

*The purpose of the Ag-Succession series of factsheets is to provide an objective overview of the issues and options related to succession planning. This information should not be a substitute for using a lawyer, accountant or financial planner to help you make a thorough assessment of your specific operation and situation.*

#### ***New Legislation***

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The *Adult Interdependent Relationships Act* was proclaimed in force effective June 1, 2003. The legislation is retroactive to the extent that it applies to adult interdependent relationships arising before or after the Act comes into force. This means that if two people have been living together in a relationship of interdependence for at least three years, then effective June 1, 2003, they are adult interdependent partners and immediately acquire all the rights given under the legislation.

The *Adult Interdependent Relationships Act* amended 69 Alberta statutes. The effect of the legislation was to give adult interdependent partners almost the same rights as legal spouses. This factsheet concentrates on the effect of this legislation on a farm estate plan.

Adult interdependent partner is the new name in Alberta for a common-law spouse. However, the term encompasses more than heterosexual common-law relationships. It includes same-sex relationships, as well as two non-conjugal persons who live together in a relationship of interdependence. In some circumstances it could even include two members of the same family, or two friends who live together.

#### **What is an Adult Interdependent Partner?**

The answer to this question is rather complex. The short answer is that if a man and a woman have been living in a conjugal relationship for at least three years, they are probably adult interdependent partners. Section 3 of the Act defines when a person is an adult interdependent partner:

- 3 (1) Subject to subsection (2), a person is the adult interdependent partner of another person if
  - (a) the person has lived with the other person in a **relationship of interdependence**
    - (i) for a continuous period of not less than 3 years, or
    - (ii) of some permanence, if there is a child of the relationship by birth or adoption,
  - or
  - (b) the person has entered into an adult interdependent partner agreement with the other person under section 7.
- (2) Persons who are related to each other by blood or adoption may only become adult interdependent partners of each other by entering into an adult interdependent partner agreement under section 7.

The Act defines a “relationship of interdependence” as follows:

- 1 (1) (f) “relationship of interdependence” means a relationship outside marriage in which any 2 persons
  - (i) share one another’s lives,
  - (ii) are emotionally committed to one another, and
  - (iii) function as an **economic and domestic unit**;

Most persons who live together in a marriage like relationship “share one another’s lives” and are “emotionally committed to one another”. The key question is whether they “function as an economic and domestic unit”. Section 1(2) of the Act sets out the factors that must be considered:

- (2) In determining whether 2 persons function as an **economic and domestic unit** for the purposes of subsection (1)(f)(iii), all the circumstances of the relationship must be taken into account, including such of the following matters as may be relevant:
  - (a) whether or not the persons have a conjugal relationship;
  - (b) the degree of exclusivity of the relationship;
  - (c) the conduct and habits of the persons in respect of household activities and living arrangements;
  - (d) the degree to which the persons hold themselves out to others as an economic and domestic unit;
  - (e) the degree to which the persons formalize their legal obligations, intentions and responsibilities toward one another;
  - (f) the extent to which direct and indirect contributions have been made by either person to the other or to their mutual well-being;
  - (g) the degree of financial dependence or interdependence and any arrangements for financial support between the persons;
  - (h) the care and support of children;
  - (i) the ownership, use and acquisition of property.

Most of these factors have been taken from cases describing conjugal, heterosexual, common-law relationships. However, there could be other factors, and not all of these factors must be present in order for persons to be considered adult interdependent partners.

For example, two friends living together might be adult interdependent partners even though they do not have conjugal relations.

## Legal Consequences of Becoming Adult Interdependent Partners

### *Domestic Relations Act*

The *Domestic Relations Act* allows for payment of spousal maintenance in the event of a divorce or separation. The Act is amended to rank an adult interdependent partner in the same category as a spouse. Thus, if two persons live together in a relationship of interdependence for at least three years, and then separate, either can apply under this Act for “spousal support.” One adult interdependent partner could be required to pay monthly spousal support to the other partner.

### *Intestate Succession Act*

If a person dies without a will, his or her estate will be divided according to the *Intestate Succession Act*. The old Act allowed only a legal spouse to take a share of the estate. Now, an adult interdependent partner is entitled to the same share of the estate as a spouse.

If a person dies without a will and is survived by an adult interdependent partner and no children, the adult interdependent partner is entitled to the entire estate. If the deceased is survived by an adult interdependent partner and one child, the adult interdependent partner takes the first \$40,000 plus one half. The child takes the other half. If the deceased is survived by an adult interdependent partner and two or more children, the adult interdependent partner takes the first \$40,000 plus one third. The children divide the remaining two thirds. For example:

- \$100,000 estate, spouse (or adult interdependent partner) and four children
- Spouse (or adult interdependent partner):  
 $\$40,000 + 1/3 = \$60,000$
- 4 Children divide the remaining  $2/3$  (\$40,000):  
each child receives \$10,000

With a million dollar estate, the same principles apply:

- \$1,000,000 estate spouse (or adult interdependent partner) and four children
- Spouse (or adult interdependent partner):  
 $\$40,000 + 1/3 = \$360,000$
- 4 Children divide the remaining  $2/3$  (\$640,000):  
each child receives \$160,000

It is possible for a person to have a spouse and an adult interdependent partner. If a husband and wife separate but do not divorce, they remain spouses. If one of the

spouses then lives together with another person in a relationship of interdependence for three years, they become adult interdependent partners. If a person dies leaving a spouse and an adult interdependent partner, then under the *Intestate Succession Act*, the person who last lived with the deceased will take the spousal share. For example, if the adult interdependent partner last lived with the deceased, then the adult interdependent partner will take the first \$40,000 plus one third. The spouse will take nothing, but is entitled to apply to the court for a share of the estate under the *Dependants Relief Act*. The court will then have to divide the estate between the spouse, adult interdependent partner and dependent children. In the end, there may be nothing left for the farming child.

### ***Dependants Relief Act***

The *Dependants Relief Act* provides that if a person makes a will and fails to make adequate provision for the proper maintenance and support of his or her dependants, the dependant can apply to the court for a greater share of the estate. The court has the power to change the will and award more to the dependant from the estate of the deceased. In Alberta, 'dependant' includes the spouse of the deceased, a child under age 18 and a child over age 18 who is unable to earn a livelihood due to physical or mental disability. Effective June 1, 2003, this Act was amended to include an adult interdependent partner as a dependent.

### ***The Wills Act***

A will is revoked when a person marries unless the will states that it is made in contemplation of marriage to a particular person. Divorce does not revoke a will. If a person gets divorced and then enters into an adult interdependent relationship, the old will is still valid. If it leaves the entire estate to the ex-spouse, the surviving adult interdependent partner will have to bring an application under the *Dependants Relief Act* in order to obtain a share of the estate.

A will is not revoked when a person enters into an adult interdependent relationship, when the partners have been living together for three years or nor when they have a child together. The *Adult Interdependent Relationships Act* amended the *Wills Act* to provide that a will is revoked only if the testator enters into an adult interdependent partner agreement, unless there is a declaration that the will is made in contemplation of entering into an adult interdependent partner agreement.

In some other provinces, like Saskatchewan, a will is revoked when common law spouses live together for a specified period of time. Persons who have assets in

another province should seek legal advice about their estate plan.

The old *Wills Act* provided that if a beneficiary or spouse of a beneficiary witnessed a will, the bequest to that beneficiary was void. The *Wills Act* is now amended to provide that if an adult interdependent partner of a beneficiary witnesses a will, the bequest to that beneficiary is void.

### ***Matrimonial Property Act***

The *Matrimonial Property Act* is not amended by this legislation. Only legal spouses have a right to make a claim for a share of matrimonial assets on divorce or separation. The Supreme Court of Canada recently confirmed this. However, adult interdependent partners do have the right to make a claim for a share of the farm assets accumulated during the course of the relationship under common-law principles of unjust enrichment and *quantum meruit*. While these principles are similar to the rights under the *Matrimonial Property Act*, they are not as great as the rights of legal spouses. It is however very important that a farmer entering into an adult interdependent relationship seek legal advice and consider signing a cohabitation agreement whereby the other partner agrees not to make a claim against the farming assets in the event the relationship does not work out.

## **Estate Planning**

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### **Farm Estate Planning for Adult Interdependent Partners**

There is probably not a great deal of difference between farm estate planning with adult interdependent partners and married persons in a second marriage. Persons with common law spouses or same sex-partners are really not in that much of a different situation than those in second marriages.

If you do not have children from a prior relationship, you probably want to benefit the surviving partner by leaving the entire estate to your partner. If the relationship is new, you may wish to leave something to other relatives or friends, but as the relationship matures, partners are more likely to leave everything to each other.

If the only children are of the relationship, the planning is similar to planning for married spouses with children. You will likely want to leave the entire estate to each other with a gift over to the children. If the children are younger, you will want to establish trusts for the

children until a more mature age, such as age 21 or 25. The trust should provide that money can be used for the childrens' education, maintenance, benefit and advancement.

If there are children from a prior relationship, the planning becomes much more difficult, especially if the children are minors. This is probably one of the most challenging areas of estate planning. You must balance the division of your estate amongst all dependants who have a right to make a claim under the *Dependants Relief Act*. If the entire estate is left to the partner, where the partner is not the parent of all the children, the surviving partner has no legal obligation to leave any part of their estate to those children. If nothing is left to the children, the surviving minor children can bring an application under the *Dependants Relief Act* for a share of the estate. This action can be brought by the Public Trustee or the ex-spouse on behalf of the children.

As with second marriages, the following strategies are useful.

- **A life insurance trust for minor children** – If properly planned, the life insurance does not form part of the estate. The court only has jurisdiction to award the dependant a share of the “estate.” None of the insurance proceeds left on trust for the children from the first marriage (or to the partner) can be accessed under the *Dependants Relief Act*.
- **A spousal trust (adult interdependent partner trust)** – This provides that all income be paid to the surviving partner for life with a power to encroach on capital in the discretion of the trustee. On the death of the partner, the remainder of the trust assets can be divided amongst the children from the prior relationship. Under the *Income Tax Act* a spouse, a common-law partner and a same-sex partner are treated the same for tax purposes. This includes a rollover of farm property and machinery, registered retirement savings plans and registered retirement income funds. This alone will not prevent an application under the *Dependants Relief Act*. The partner might still make an application under the *Dependants Relief Act* to set aside the spousal trust and the minor children could also apply for a share of the estate.
- **Allocation of the estate** – If the estate is larger, the testator can afford to allocate different parts of the estate to the various dependents. This is probably desirable if some of the children are involved in the farming operation. However, an adult interdependent partner can upset this planning by making an application under the *Dependants Relief Act*.

- **Trusts for minor children** – These trusts usually include power to use the funds for the maintenance, education, benefit and advancement of the children. When the minors attain the age of majority, the remainder of the child's share can be transferred to the children. The trust could be kept in place until all the children attain age 21 or later, so that the funds can be used for post secondary education. If the partner is also the guardian, he or she can request funds from the trustee for maintenance and education of the children. In the alternative, the funds can be paid to the surviving partner when all of the children attain the specified age, and if the partner is not then alive, the funds can be divided amongst the children. Farm property can be held in a trust for children but the tax consequences should be carefully examined.
- **Provision for child support payments** – Plans should be made for payment of child support pursuant to a divorce judgement or minutes of settlement. This is a debt of the estate and the maintenance must be paid until the children are older. It is sometimes useful to provide for a trust of insurance funds, whereby the proceeds are paid firstly in satisfaction of the child support. The balance can be held for extraordinary requirements of the children, with the children receiving anything left over at the age you specify.

## Adult Interdependent Partner Agreements

An adult interdependent partner agreement is like a marriage license for common law spouses and same-sex partners. If two people sign an agreement, they immediately become adult interdependent partners.

Any two people who are living together or intend to live together in a relationship of interdependence may enter into an adult interdependent partner agreement in the form provided in the regulations. A person may not enter into an adult interdependent partner agreement if the person is married or is a party to an existing adult interdependent partner agreement.

Probably the only time a person would want to sign an adult interdependent partner agreement is if they immediately want to acquire the rights of spouses and do not want to marry.

People who are related to each other by blood or adoption may only become adult interdependent partners of each other by entering into an adult interdependent partner agreement. This is not advised as there are better solutions.

## Farm Estate Example

Should a family member sign an adult interdependent partner agreement? As it concerns only the succession statutes, it is hard to justify advising a family member to sign an adult interdependent partner agreement primarily because of the *Dependants Relief Act*. Once an agreement is signed, the surviving adult interdependent partner is entitled to apply to the court for a share of the estate. While this is an advantage to the claimant partner, it could create difficulties for the other beneficiaries of the estate, particularly the farming child who has been working on the family farm for years. In the end, the parents' wishes may not be carried out if the court orders a different distribution of the estate than what is provided in the will. For example:

John and Jane were married for 45 years and built a successful farming operation on two sections of land. John died five years ago and since all the farm assets were owned in joint tenancy, Jane is now the owner of the entire farming operation. Jane's entire estate is tied up in the farming business, which is valued at two million dollars. Jane has two children.

- Sam has farmed with John and Jane for 20 years and contributed substantially to the development of the farming business. He lives with his family on his own acreage, close to the home quarter.
- George is a capable, competent child. He moved back home to live with his mother when John died. He works off the farm and helps his mother with the household expenses and household chores. He does not contribute to the farming business. However, George convinced his mother to sign an adult interdependent partner agreement when he moved back home. George and Jane are therefore adult interdependent partners.

Jane died in a car accident last week. She never made a will. It was always understood that Sam would take over the farming operation, but George would never cooperate and the plan was never finalized.

Jane's estate will be divided in accordance with the *Intestate Succession Act*. Since George and his mother are adult interdependent partners, he will receive the first \$40,000 plus one half of the estate for a total value of \$1,040,000. Sam will receive the remaining half valued at \$980,000. Sam cannot afford to buy the farming business from George. Therefore, the farm, which has been in the family for three generations, must be sold off.

**Change the facts** – Jane had made a will leaving the farm to Sam on the condition that he grant a mortgage on the farm, payable over five years to George in the sum of \$400,000. George applies to the court as an adult interdependent partner under the *Dependants Relief Act*

and is awarded one half of the value of the estate, payable immediately. After legal fees incurred in the lengthy court battle, and the court award pursuant to the *Dependants Relief Act*, there are insufficient assets to constitute a viable farming operation for Sam.

## Non-conjugal Adult Interdependent Partners; Two Friends on the Farm

Non-conjugal friends living together in a relationship of interdependence for a continuous period of not less than three years will become adult interdependent partners, whether or not they intend to. While it may be possible to contract out of some of the statutes amended by the *Adult Interdependent Relationships Act*, it is against public policy to contract out of the *Dependants Relief Act*. Parties in such relationships may be surprised to discover that they are affected by this legislation. The party who wishes to leave their estate to children from their first marriage, or adult interdependent relationship, will have additional planning challenges not encountered before. For example:

Joe, age 60, is an Alberta farmer. He is widowed and has one son, Dave. Dave has farmed with Joe for 30 years.

Joe has a good friend, Fred, who he has known all his life. Fred lost his farm in a foreclosure a number of years ago and had no where to live. Since Joe and Fred were good friends and Joe was widowed, he asked Fred to move into his home and they have lived there ever since. Fred helps on the farm, but does not receive any salary. Fred has no other sources of income and relies on Joe for the necessities of life. He does regular chores on the farm.

Fred is also widowed and has three adult children.

Joe dies without a will. He always understood that since his spouse had predeceased him, his only child, Dave, would inherit all his estate under the *Intestate Succession Act*. However, if Fred is an adult interdependent partner, he will inherit the first \$40,000 plus one half of Joe's estate. Dave will be left with the remainder, but this is not enough to sustain an economically viable farm.

**Change the facts** – Joe signs a will leaving all of his estate to his son, Dave. Fred's children encourage him to bring an application under the *Dependants Relief Act* to obtain a share of Joe's estate for Fred because he is an adult interdependent partner. When Fred dies, his children will inherit his estate.

Before this legislation, the advice to Joe would have been fairly straightforward. He should sign a will leaving his estate to Dave. He might want to make

provision for Fred in his will, such as a trust for his house allowing Fred to live in it for his lifetime and perhaps a trust of some money to ensure that Fred has enough money for living expenses. When Fred dies, the trust would provide that the house and money would pass to Dave. In this manner Joe can preserve his farm for his son and also ensure that his good friend Fred is taken care of.

It might be advisable for Joe and Fred to sign a cohabitation agreement of the kind typically signed by conjugal couples, whereby they each agree not to make a claim against the other for unjust enrichment or for maintenance, and that they will not make a claim against the survivor's estate. The difficulty is that they cannot contract out of the *Dependants Relief Act*. The unfortunate thing about such relationships is that it is not the friends who will usually bring the application. It is the children of the parties who often urge their parent to take action, or who bring the application on behalf of an incapacitated parent pursuant to an enduring power of attorney. It is hoped that the court will recognize that these types of relationships are different from conjugal relationships and design the remedy appropriately. In this circumstance, a trust for the surviving friend is more appropriate than a capital payment out of the estate.

## Conclusion

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The *Adult Interdependent Relationships Act* is a good development in the law in that it clarifies the rights of common-law spouses. However, if you are a farmer with an adult interdependent partner it is critical that you seek legal advice and plan your estate to achieve the results you want. At a minimum, see your lawyer to update your will.

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